Fair Political Practices Commission
May 23, 2002

Legislative Bill Analysis
AB 3051

Assembly Bill 3051 (Papan)
Campaign: Independent Expenditure Disclosure
Version: As amended, April 23, 2002
Status: Passed Assembly; to Senate

Summary of Proposed Bill

This bill would expand the advertising disclosure requirements for independent expenditure committees to pre-recorded telephone messages that are delivered to the homes of more than 200 potential voters.

This bill would also add a requirement that telephone, broadcast and mass mailing advertisements paid for by independent expenditures must include: 1) a disclaimer that the advertisement was produced without the permission or authorization of any candidate for political office, 2) the name of the "independent expenditure committee," 3) the cost of the advertisements and 4) whether the advertisement was produced in support of or opposition to a candidate.

Existing Law and Regulations

Government Code Section 84506, added by Proposition 208, requires committees that make independent expenditures for broadcast and mass mailing advertisements to disclose their top two contributors. In emergency regulation 18450.4, the Commission applied the disclosure requirement in this section to those contributors of $50,000 or more to conform to similar reporting requirements in sections 84503 and 84504. This regulation was adopted on a permanent basis at the May 10, 2002 Commission meeting.

Current law does not expressly speak to prerecorded telephone messages. However, the Commission has tentatively determined that prerecorded telephone messages are included in the definition of broadcast advertisements for purposes of section 84506, and are required to include the disclosures required in that statute.

Background

Assemblyman Papan introduced this legislation in response to an independent expenditure campaign opposing his daughter's primary election bid for an Assembly seat. He feels the bill addresses the widespread problem of independent expenditure committees funding misleading campaigns against candidates.

Discussion and Policy Considerations

The March legislative primaries were the first regular elections held under Proposition 34's contribution limits. Possibly because of these limits, a greater number of individuals and entities chose to make independent expenditures supporting or opposing legislative candidates in

broadcast advertisements, newspaper ads, and in direct mail campaigns. This move to regulate the largely unregulated area of independent expenditures was seen much earlier in Los Angeles, San Francisco and some other local jurisdictions where contribution reform schemes were to some degree thwarted by "non-candidate spending." Not long after its first few elections under contribution limits, San Francisco enacted an independent expenditure ban, which was found unconstitutional by a federal court. San Francisco subsequently adopted a more narrow approach to regulating independent expenditure campaigns. Los Angeles recently enacted a ban on independent spending from the treasuries (distinguished from the political action committees) of unions and non-profit corporations, and amended its campaign reform ordinances to increase expenditure caps and matching funds when independent expenditures reach certain levels.

Given this movement toward increased disclosure for independent spending, the Commission may wish to support a modified version of this measure. In addition, staff recommends that, if the bill is amended to address some of the concerns expressed below, the Commission request that the author add language to the bill amending section 84502. This amendment would address the disclosure issue raised at the Commission's May 9, 2002, meeting by providing that the two major donors of over $50,000 be selected by considering all contributions made in the previous 12-month period.

Constitutionality: In its current form, staff believes the disclosure component of this bill could give rise to a constitutional challenge. The Commission is the most likely defendant in a lawsuit challenging the constitutionality of this section as it would be amended by this bill. If a lawsuit were brought, the cost of defending against it would be paid from the Commission's budget. For this reason, Commission staff recommends several amendments to the bill to reduce the likelihood of a constitutional challenge.

If the statute proposed by this measure were challenged, one inquiry would be whether the requirements placed on independent expenditures were unduly burdensome. Staff's concern is that the several additional (and, in some instances, unique) disclosure requirements placed on independent expenditures would, when considered together, constitute an unconstitutional burden on independent campaign speech. The amendments below are offered to help reduce the likelihood that a constitutional challenge will be brought.

In order to put the amendments in context, a model of the disclosure required by the bill may be helpful. The broadcast disclosure required would be to the effect of:

> "This paid political advertisement was produced without the permission or authorization of any candidate for political office. This advertisement was paid for by the XYZ Committee at a cost of $225,000 in support of a candidate."

Disclaimer: Staff believes a court could find the language "produced without the permission or authorization of any candidate" to reflects a bias against the communication in question. For this reason, staff recommends the disclaimer read "not produced in coordination with any candidate."

Cost of the Advertisement: Staff believes this requirement could be found by a court to convey bias against the communication, and recommends deletion of this requirement.
Broadcast Disclaimers: The bill would require broadcast disclaimers to be made at the beginning of the advertisement "to warn voters that what they are about to see or hear is not paid for or

authorized by a candidate," and requires that the text of the disclaimer be run throughout the entire ad. Staff recommends that this language be amended to require audible and text disclaimers at any time during the advertisement in order to parallel disclosures required of other types of political advertisements.

Technical Amendments As written, the bill would not require the name of the candidate supported or opposed by the advertisement to be disclosed. If the author wants particular candidates identified, the bill should be amended to clarify that requirement.

Contributors of $50,000 or more: The Commission has interpreted that the existing language of section 84506 requiring disclosure "consistent with any disclosures required by Sections 84503 and 84504" requires only disclosure of the two largest donors of $50,000 or more. The problem arises in those circumstances where no one source has given more than $50,000, which is frequently the case with independent expenditures.

For this reason, the Commission may wish to request amendment of the bill to remove the reference to these two sections and instead set a dollar threshold within this section. Staff recommends a threshold of "more than $5,000" in order to correlate to the maximum contribution allowed to a state recipient committee. In this way, an independent expenditure advertisement paid for by a political action committee (PAC) subject to the $5,000 contribution limit would have to disclose the PAC's name, but not the name of any individual contributors. At the same time, an advertisement paid for by a committee formed to make independent expenditure advertisements would have to disclose both its name and the names of the top two contributors of more than $5,000.

Name: The bill provides for disclosure of the "name of the independent expenditure committee." However, committees other than those formed under section 82013(b) also make independent expenditures (e.g., recipient committees formed under section 82013(a)). Moreover, independent expenditure committees formed under section 82013(b) do not file statements of organization and thus do not register a "committee name." It would be more accurate to require "the name of the committee, or, if the committee is an independent expenditure committee, the name of the filer making the independent expenditure."

Pre-Recorded Telephone Messages: There is a potential loophole in the applicability of the disclosure requirement to pre-recorded telephone messages. Unlike the term "mass mailing," the term "broadcast advertisement" does not include the words "substantially similar." As such, a committee could conceivably avoid the disclosure requirements for pre-recorded telephone messages by recording slightly different versions of telephone messages, and sending each of the messages to no more than 200 potential voters. To address this potential loophole, staff recommends the following amendment to the bill:

> "For purposes of this section, "broadcast advertisement" includes *200 substantially similar* ~~a~~ pre-recorded telephone ~~message~~ *messages* expressly advocating the election or defeat of a clearly identified candidate that ~~is~~ *are* delivered *to more than* ~~to the homes of more than~~ 200 ~~potential voters~~ *households* at any time during the 20 days immediately before an election."

Mass Mailings. As currently worded, the bill would create an ambiguity in the law with respect to mass mailings, and the type-size for required disclaimers. The bill would require that the disclosure appear on the front of the mailer, in boldface uppercase type, at least 12-point in size, and that "all other required disclaimer information" on the mailer must be in 8-point size. This could be read to mean that all other disclaimer requirements imposed by the Political Reform Act for mass mailings, apart from those imposed by this bill, must be in 8-point size type. To avoid this ambiguity, the bill should be amended, as follows:

> "(2) All other required disclaimer information *required pursuant to paragraph (1)* shall be printed on the front page of the mailer, in boldface uppercase type, at least 8-point in size."

Recommendation: Support if amended to address the above concerns.